Setting the Agenda of Courts and Tribunals Through Funding Decisions

James MACPHERSON*

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* Justice, Ontario Court of Appeal, Toronto, Ontario.

Justice is one of the most important subject area in a democratic and civilized society. If you asked Canadians to close their eyes and identify areas in which they want Government to be involved, and indeed to do a good job, I suspect that their list would be health, education, social safety net, and justice.

The importance that the public attaches to justice is nothing new. It is as old as Confederation, as reflected in the *Constitution Act, 1867* which assigned jurisdiction over various justice topics to both levels of Government in sections 91(27), 91(28) and 92(14).

Justice depends on access. There is a crucial role, for both Governments and the courts, in ensuring access to justice. The topic that this panel has been invited to address is *Setting the Agenda of Courts and Tribunals Through Funding Decisions*. Funding means, of course, money provided by Governments. So I will speak principally about Governments, funding and access, all from the perspective of a judge—six years as a trial judge and two and a half years as an appellate judge. However, I also want to speak, albeit more briefly, about the role of courts and tribunals in promoting access to justice.

I. GOVERNMENTS AND ACCESS

There is a serious problem in Canada today with respect to access to courts. The problem has two dimensions—fewer cases and more self-represented litigants.

The fact of fewer cases can be dramatically illustrated by Ontario's recent experience with respect to civil litigation. In 1992, there were approximately 43,000 new filings of civil cases. By 2000, only about 20,000 new civil cases were initiated. There was, it can be seen, approximately 55 to 60 per cent decrease in civil cases in less than a decade

Is this necessarily a bad development? Perhaps not. Courts are places of contention, court procedures are difficult, and the results of court decisions usually create absolute winners and absolute losers. In 1906, Dean Roscoe Pound wrote:

"The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every turn [...] The effects of our exaggerated contentious procedures is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law."

The result of concerns like this in recent years has been a rapid growth of interest in and resort to mediation, alternate dispute resolution and comprehensive legislative responses like no-fault automobile insurance. Accordingly, some of the decline in civil cases has been the result, arguably, of beneficial diversification and creativity in the administration of justice.

Moreover, Governments have taken important initiatives in several areas to encourage access. Let me mention four initiatives.

First, and probably most importantly, the *Canadian Charter of Rights and Freedoms* has transformed the work of courts and tribunals. The important values set out in the *Charter* and the overarching (that is to say constitutional) protection for those values have created a strong desire to bring rights issues before courts and tribunals.

Second, Governments have developed targeted funding programs to encourage access. For example, the federal Government has developed a court challenges program and an aboriginal issues fund which deserve to be commended.

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I exclude motor vehicle civil cases because legislative changes in this area on several occasions in the 1990s had a significant impact on these cases.

Third, Governments have enacted legislation to encourage access through creative means. A good example is class proceedings laws in several jurisdictions.

Fourth, in the criminal domain, I have often been impressed with the position taken by Crown counsel in criminal cases involving self-represented accused persons. In spite of serious financial constraints, they will not dispute the need for Government funding of counsel if the nature of the criminal case requires professional representation.

So, to summarize, the dramatic decline in cases is not all bad (some of those cases have simply moved to other useful fora) and Governments have often been faithful to their constitutional mandate to administer a good, even an excellent, justice system.

However, the reality today is that many people, especially low and middle income people, cannot come to court at all. The reason—no money. And many people who do come to court must represent themselves, even in, sadly, criminal cases. The reason—no money. This is wrong. It is regression, not progress.

Is there a Government role in this regression? In my view, there is. Governments have failed in the area of legal aid funding. The average Government funding for legal aid dropped about 30 % in the 1990s. Applications for legal aid, many from deserving people, decreased by a corresponding amount.

Governments must always strive to strike a proper balance between the value of equality and efficiency. Canadians want equality. That is why we have medicare and a public school system. That is why, in the justice domain, access is so important. However, equality in the health, education and justice domains is expensive. Canadians also want efficiency in the delivery of basic services.

In the justice system, efficiency has won the debate with respect to legal aid funding. The results are fewer people in the court system and decreased coverage for those who try to resort to the courts. From the perspective of a judge with eight years experience at both the trial and appellate levels, both of these developments are wrong.

Can Governments solve these problems? In my view, they can, in part by focussing more strongly on different delivery systems for legal aid. The dominant, although not exclusive, Canadian model is judicare with its emphasis on private lawyers. This model promotes access and

emphasizes the value of equality—the person who obtains legal aid can choose the lawyer of his or her choice. The disadvantage of this model, however, is its high cost.

Several Canadian jurisdictions, in an attempt to strike a better balance between access and cost, have moved in the direction of community clinics and staff lawyers. In my view, this is a very good development. My experience indicates that community clinics are staffed by thoroughly competent, experienced and dedicated lawyers (the Parkdale Legal Services Clinic in Toronto is a prime example). Moreover, the fact that these clinics are community-based gives them a visibility that promotes access. Finally, there is no question that this model is less expensive that the private lawyer model.

In a comprehensive review of legal aid in Ontario, the *Ontario Legal Aid Review* (1997), Professor John McCamus recommended:

"9. The plan (OLAP) should seek to narrow the gap between full representation and no representation through provision of a much greater variety of legal services in order to assist a broader range of potential clients by invoking a wide spectrum of delivery mechanisms, including, for example, public legal education, duty counsel, supervised paralegals, staff officers, community legal clinics, judicare, and block contracting."

I agree with this recommendation. I hope that Governments will pay heed to it as they explore ways to restore a legal aid system that has badly deteriorated throughout Canada in recent years.

II. COURTS, TRIBUNALS AND ACCESS

Canadian courts and tribunals have promoted access in many important ways. Their substantive interpretation of the *Charter* has opened the doors to many disadvantaged individuals and groups. Liberal definitions of standing and intervenor have also allowed more people to raise more issues before the courts. As well, courts will order that counsel be appointed for some litigants: see s. 684 of the *Criminal Code* and *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)*, [1999] 3 S.C.R. 46 and *Winters* v. *Legal Services Society*, [1999] 3 S.C.R. 160.

In spite of these good developments, courts and tribunals could do more to promote access. Let me mention three possibilities.

First, in the category of non-economic access, courts need to do better with respect to jury charges in criminal cases. In 2001, criminal jury charges are long, complicated and unclear. Some jury charges are even lasting for days, not hours! Juries must find them incomprehensible. Courts should strive to develop and deliver brief and clear model jury charges, perhaps with typed portions being distributed to the jury.

Second, courts and tribunals need to recognize that access is not just *entry* into the system, it is also *progress* through the system. In my view, the progress of many cases through the courts, both trial and appeal, and through tribunals is remarkably slow. We need to emphasize more such devices as case management, assignment of a single judge to a case, and simplified procedures. In *Blencoe* v. *B. C.* (*Human Rights Commission*), [2000] 2 S.C.R. 307 at 384, Justice Lebel said:

"Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians."

We need to be vigilant and creative to ensure that this description does not apply to the courts and tribunals on which we serve.

Third, courts and tribunals need to recognize that access is not just *entry* into the system; it is also a prompt *exit* from the system. I am constantly amazed at how long some judges and tribunals take to make their decisions after the hearing has concluded. The Canadian Judicial Council has a six-month guideline for judgments; it is routinely ignored. As a judge, I see decisions of courts and tribunals that were reserved for year(s), not months!

This is wrong. It is very unfair to litigants who suffer the psychological stress of waiting for a result. It is also surprising, given that judges and tribunal members must have worked to all manner of deadlines in their pre-judicial careers. Finally, it is bad for the reputation of the justice system. "Slow justice" is, in my view, an oxymoron.